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George G. McAnerney v. Department of Public Safety, Drivers' Licensen Division, and George C. Miller : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

GEORGE G. McANERNEY,
Plaintiff and Appellant,

vs.

DEPARTMENT OF PUBLIC SAFETY, DRIVERS' LICENSE DIVISION, and GEORGE C. MILLER, Director,
Defendant and Respondent.

Case No. 8969

BRIEF OF APPELLANT

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STATEMENT OF FACTS

The following facts are undisputed. Mr. McAnerney is a resident of Utah. He is the sole sales representative in the intermountain area for a large paper company (R. p. 11). By the nature of his business he is required to drive long distances, averaging 800 to 1000 miles a week (R. p. 11-12). He has been driving an automobile since 1932, a period of 27 years, and has never been involved in an accident (R. p. 12-13).

On March 8, 1956, he was arrested by the Utah

Highway Patrol for speeding in Brigham City. On March 28, 1957 he was arrested by the Utah Highway Patrol for speeding near Farmington, Utah, being clocked at 66 miles per hour in a 50-mile zone. On May 28, 1957, he was arrested for speeding in Salt Lake City. On the basis of these three arrests the Department of Motor Vehicles did issue a notice of suspension of his driver's license for a three-month period. On October 11, 1957, after Mr. McAnerney had come to see defendant George Miller, this was changed to a restricted license (Ex. P-1, p. 2). Mr. McAnerney has been charged with no other traffic offenses in the State of Utah until May 19, 1958, when he was again arrested for speeding on South State Street in Salt Lake County. The files of the Motor Vehicle Department have reports from the Arizona Highway Patrol indicating a charged traffic violation in Tucson on March 16, 1958, (which McAnerney testified was for making a "rolling stop" on a Sunday morning. R. p. 15-16) and from the State of Nevada indicating a charged violation in Nevada January 23, 1958, (which McAnerney testified was for going about 35 m.p.h. in a 25 m.p.h. zone. R. p. 16-17).

On July 1, 1958, Mr. McAnerney received another notice of suspension suspending his license for six months, for the stated reason of habitual negligent driving. On July 22, 1958, Mr. McAnerney and

his counsel did request a hearing and appeared on that date before defendant Miller who read over his file with the dates and offenses charged against McAnerney and did inform them that this constituted a hearing, that he would not go behind on the documents in his file, and that McAnerney was habitually negligent (R. p. 1-2.). McAnerney appealed from this determination and after hearing the District Court, the Honorable Aldon J. Anderson presiding, did on August 8, 1958, rule that the order of suspension of McAnerney's license was null and void and would be set aside (R. p. 30-32.).

Shortly thereafter, on September 4, 1958, defendants did issue an additional order of suspension. McAnerney requested in writing a hearing and on September 22nd McAnerney and his counsel appeared before Mr. Miller and a stenographer of his office.

The stenographer's notes, introduced in evidence as Exhibit P-1, showed that the following was said:

> This is a hearing before George C. Miller, Director of Drivers' License Division, as hearing officer. This is the date set as requested by George Gardner McAnerney at the request of his attorney Albert J. Colton as the result of a six months' suspension of Mr. McAnerney's driving privilege in the State of Utah.
>
> The record can show that his license had

been suspended by the Drivers' License Division on October 7, 1957, for a period of three months at which time Mr. McAnerney requested a hearing and was granted a restricted driver's license to drive in connection with his work with International Paper Company. The record will further show that there is here in connection with this hearing the driver license folder of Mr. McAnerney including the Reports of Conviction from the respective courts wherein Mr. McAnerney has been charged with certain violations of the traffic laws. The record may show that in the opinion of the Department it is not necessary to subpoena any of the officers who have given citations or the judges to prove the convictions in this driver folder nor to subpoena any witnesses, nor any records in addition to the record as held by the department.

Mr. Colton: Just a minute Mr. Miller, do you intend to put on any evidence?

Mr. Miller: None whatever other than the record itself.

Mr. Colton: Are you offering the record as evidence?

Mr. Miller: I am accepting it as evidence.

Mr. Colton: You are acting in this case in the capacity of the hearing officer?

Mr. Miller: Correct.

Mr. Colton: And you are submitting to us the file?

Mr. Miller: That is correct and accepting it.

Mr. Colton: And as I understand it the State of Utah does not intend to put on any evidence other than the file?

Mr. Miller: None whatever.

Mr. Colton: I would like ---------- record a motion that the suspension of Mr. McAnerney's driver's license be vacated on the grounds for the reason that the State of Utah has failed to put on sufficient evidence to constitute good cause to show that Mr. McAnerney is an habitually negligent driver, and that pursuant to the provisions of the applicable statutes and further pursuant to the request for a hearing made by me in writing in a letter addressed to Mr. Miller on September 8, 1958, it was requested that the Department produce witnesses to testify under oath as to the reason for the Order of Suspension on the grounds stated so that Mr. McAnerney through his counsel could cross examine these witnesses and examine the relevant books and papers which would be produced pursuant to this request.

Mr. Miller: The Department has deemed under Section 41-2-19 Utah Code Annotated 1953 subsection 4 that Mr. McAnerney is an habitually negligent driver and denies the motion as heretofore stated by Mr. Colton.

Mr. Colton: Again for the record Mr. Miller as a background for another motion I would like to make I am not sure what relevance to this hearing the fact that Mr. McAnerney's license was suspended on October 7, 1957, has and without any showing of re-

striction I would motion to strike from the record any records of this.

Mr. Miller: The procedure of the Drivers' License Division as established is that when an individual has three moving violations in any consecutive 18 month period the first suspension is a three-month suspension. The second suspension is a six-month suspension. The situation in this proceeding at the present time is that Mr. McAnerney has had his six months' suspension in accordance with the administrative procedure of the Department.

Mr. Colton: But doesn't it have anything to do with whether Mr. McAnerney is or is not an habitual negligent driver?

Mr. Miller: As in the fact that he has had a previous suspended license and has been before the Department and apprised of his violations and then the continued violations as shown by the record is evidence that he is an habitual negligent driver as provided in the section heretofore stated.

Mr. Colton: I would like to move to strike any reference to the previous suspension on the grounds that the record as it now stands shows no reference to the previous suspension on the grounds of .....

Mr. Miller: That will be denied.

Mr. Colton: I take it the State rests.

Mr. Miller: Yes, call Mr. McAnerney to be sworn in . . .

Mr. Colton: I take it that the basis

upon which the State is acting are the violations which are shown on the file where it says "Applicant's Driving Record this side for Department use only?"

Mr. Miller: And also the reports of conviction in the folder itself.

Mr. Colton: I notice that there is a line drawn betewen the first and second notations.

Mr. Miller: That was a line made by myself when Mr. McAnerney was in my Office as of October 11, 1957, at which time I granted him a restricted license in connection with his record up to October 7, 1957.

At that time McAnerney did testify describing in detail the facts and circumstances surrounding each event referred to in the Department's files. Miller then entered an order suspending McAnerney's license from which McAnerney appealed to the District Court. McAnerney petitioned for review, alleging that defendants had unconstitutionally deprived him of property without due process and improperly found him to be an habitual negligent driver. (R. p. 36-39)

The matter was heard again by the Honorable Aldon J. Anderson. The court stated at the outset of the hearing "As it stands, as the court views the statute, is the fact that the Department found he was a negligent driver, and you may put on evi-

dence to refute that." (R. p. 10). Mr. McAnerney was put on the stand and testified to the facts surrounding the citations contained in the State's file.

The State put on no testimony other than that of Mr. Miller who merely stated that he had given Mr. McAnerney a hearing. Although the transcript does not show it, evidently the following documents were marked and accepted into evidence:

> Three reports of conviction for violation of motor vehicle laws, Form DLD-19 3-56.
>
> Exhibit 3 had attached to it a form "Citation" of Utah Highway Patrol. Exhibit 1 had upon it the words "Bail posted and forfeited".

The trial court then entered findings of fact reciting that "Based upon the record of six arrests for moving vehicle violations contained in files of defendants herein, within a period of 18 months, three within the State of Utah, and three without the State of Utah, and based on the testimony of plaintiff before this court, plaintiff is declared to be an habitually negligent driver," and the administrative action was affirmed. From this determination, Mr. McAnerney appeals.

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ARGUMENT

POINT I.
INTRODUCTION

Appellant, as one who drives on the public highways much more than the average person, would be the first to recognize that the safety of all people, including himself, must be safeguarded by the State of Utah's sincere and earnest attempts to enforce its traffic laws. But as history shows, it is often the overzealousness of those working for ad-

mittedly worthy ends that pose some of the greatest threats to our democratic society. It is appellant's contention that the cries of the public and of the press for traffic "enforcement" must not overshadow the basic rights and dignity of each citizen, and of the orderly process of law in a field which probably brings more people in contact with the machinery of law enforcement than any other. Appellant contends that the State has not shown him to be habitually negligent.

POINT II.

APPELLANT IS NOT AN HABITUAL NEGLIGENT DRIVER.

a. Definitions.

"Habitual" has been defined as something which is "*repeated* by force of habit." Webster's New International Dictionary 2nd Sd. "Habit" is defined as "A settled disposition or tendency . . . leading one to do easily, naturally, and with growing skill or certainty what one does often." The State would have one believe that the record here pellant contends that the State has used an improper pocedure and has not shown him to be habitually negligent.

b. The means by which the State attempted to prove its case were improper and unconstitutional.

The statute under which the respondents pro-

ceeded is Section 41-2-19, Utah Code Annotated 1953. This provides inter alia that three moving violations of the motor vehicle laws of Utah shall be deemed prima facie evidence of habitual negligence and that the Department may immediately suspend the license without receiving a record of conviction whenever the Department has reason to believe that such person is an habitual negligent driver.

However, the law further provides that upon suspending such a license the person shall be entitled to a hearing and further

> "Upon such hearing the Department or its duly authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require reexamination of the licensee. One or more members of the Department may conduct such hearing, and any decision made after a hearing before any number of the members of the Department shall be as valid as if made after a hearing before the full membership of the Department. After such hearing the Department *shall* either rescind its order of suspension or, *good cause appearing therefor*, may extend the suspension of such license or re voke such license." (Emphasis ours.)

Appellant contends that this statute places the burden of proof upon the State to show good cause if they choose to suspend the license, and that the administrative travesty set forth as a "hearing"

in this case could not conceivably be construed as meeting this test. Moreover, Appellant contends that the trial judge also misconstrued the function of the statute by stating that it was up to the driver to refute this finding, and to base the court's conclusion to any extent on the evidence of convictions contained in the State's files was erroneous.

Mr. Miller acted as judge and prosecutor. He merely looked at his file, found what he considered evidence of three violations, and made his determination. He expressly rejected appellant's rights to cross-examine those who executed the documents in question or to confront them and made his determination even prior to Mr. McAnerney's chance to tell his own story.

It has been clearly established by many courts that such procedure is improper.

> "Where a hearing is required, it must be held in accordance with the statute or ordinance, and, where the officer before whom the hearing is had exercises quasi-judicial functions, he must exercise them in a legal manner. Such hearing is a judicial hearing at which the acting board or official may act only on the specific charges made and the licensee has a right to be confronted by the witnesses who testify against him, and should be afforded an opportunity to cross-examine his accusers. The decision revoking the license must be based on legal evidence of sufficient weight to support such charges; but

if such hearing is civil in its nature, even though the charges made are based on the commission of a crime, the charges so made may be established by a preponderance of the evidence." 60 C.J.S. 492, Motor Vehicles Sec. 160.

Thus a New York court in a hearing dealing with the revocation of a driver's license, where evidence supporting the State was introduced in the form of affidavits from police officers, made the following statement:

"In determining that question it must be remembered that the license which has been annulled is of substantial value to the petitioner. It is a permit issued according to law by the Motor Vehicle Bureau for him to drive an automobile, without which it would be unlawful for him to do so. He has a vested right therein which cannot be taken from him capriciously or arbitrarily.

"In a proceeding of this kind the Commissioner of Motor Vehicles is given quasi-judicial functions which he must exercise in a legal manner. The revocation of petitioner's license was not based upon a conviction; therefore it can only be revoked after a hearing and upon good cause based upon competent legal testimony. Petitioner has a right to be confronted with the witness at such hearing and given an opportunity to cross-examine his accusers. That is the only way he can secure a fair hearing (citing cases). Failure to give the accused an opportunity to be heard in his own defense and to cross-examine his

accusers violates a basic right secured to every citizen by our Constitution.

"In my opinion, substantial rights of the petitioner were violated to his prejudice when the Commissioner received the affidavit of the witness Barry and the testimony of the witness Garman without giving the petitioner an opportunity to be confronted by his accusers and to cross-examine them or either of them.

"Petitioner's application to vacate the order of revocation of petitioner's license is granted." *Re application of Goodwin*, 173 Misc. 169, 17 N. Y. Supp. 2d 426, 428 (1940).

Accord, *Re application of Kafka*, 272 App. Div. 364, 71 N. Y. Supp. 2d 179 (1947).

The Supreme Court of Rhode Island, in holding that proof was insufficient to justify revocation of a driver's license, stated:

"As the hearing is a judicial hearing, it follows that the decision of the Board must be based on legal evidence as sufficient weight to support the specific charges made. By the terms of the act the Board may in its discretion refuse to grant a license to any applicant whom for any reason it considers an improper person. A broad discretion is thus given to the board which of course must be exercised in a manner reasonable and not arbitrary. But the power to revoke a license after a hearing is more restricted. The words of the act 'for any cause the board may deem sufficient' must be construed in the light of

the other parts of the act. The provision for notice and hearing restricts the power of the board to act only on the charges made. The Board revoked the license on the ground that Glass was an unfit and improper person to be licensed. The only support for this finding is that the board found him guilty of a single offense of receiving stolen goods. In our opinion, the evidence is not sufficient to support this finding . . . Although in the circumstances it is perhaps too much to expect that the established rules of legal procedure should be followed with the exactness required of a court of law, yet it is only fair to the accused that there should be a substantial compliance with the fundamental rules of legal proceedings . . ." p. 245. *Glass* v. *State Board of Public Roads*, R. I., 115 Atl. 244, (1921).

In *Willis v. Commonwealth*, Va., 56 S. E. 2d 222, (1949), Willis was given a notice to appear and show cause why his license should not be suspended or revoked because he had been convicted of reckless driving on March 14, 1947, and that he had been involved in accidents in Virginia on July 25, 1946, August 14, proceeding to suspend or revoke driving privileges because of involvement in accidents, the burden of proof was upon the Commonwealth. It stated that while the properly authenticated abstract of a conviction of the defendant for reckless driving may constitute prima facie evidence that he operated his motor vehicle recklessly on the occasion involved and casts upon the defendant the burden of proof

that his conduct was not such as to show that he was an unsafe driver or that his continued operation of a motor vehicle constitutes a hazard to other highway users.

> "If the explanation given in his testimony is reasonable and credible, especially when not contradicted by testimony of any other witness, it should not be disregarded but should be weighed along with the other evidence in the case . . . the test is whether the revocation or suspension of the operator's license' is necessary for the safety of [others] on the highway'. This must be determined on the basis of the past conduct of the defendant." (p. 224)

The court held that the introduction at the hearing of reports of drivers of other cars and of investigating officers was prejudicial error.

> "We hold that it was prejudicial error for the court to consider the ex parte statements contained in the reports. A fair trial, to be in conformity with the statutory provisions referred to above, required that the appellant be given an opportunity to cross-examine the persons who made these statements. The reports themselves were clearly inadmissible under the mandate of the statute.
>
> "The purpose of the statute is to deny the use of the highways to persons who are known to have been so reckless in their customary operation of motor vehicles that a repetition of the same, or similar conduct,

may be expected, and if it occurs, it will constitute a menace to the safety of others. The statute has not only a laudable object, but a necessary one. Accidents due to carelessness or recklessness are taking a terrible toll of life and limb. But it was intended to apply only to drivers who are, in fact, unsafe, and this fact the statute contemplates must be proved by clear and reliable evidence at a fair trial." See also *Stella* v. *MacDuff*, 281 App. Div. 800, 119 N. Y. Supp. 2d 483 (1953).

The trial judge neither treated this as a review of an administrative hearing or as a de novo proceeding. He assumed that in the hearing before him the burden was upon McAnerney to overcome the administrative finding. In order to do this, the judge should have at least looked to the administrative record to see if these were even colorable compliance with the statute and administrative due process. This would be the minimum standard for proper judicial review. This was not done, and even if it had been done, the administrative record clearly showed that there was not one scintilla of proper evidence to support the administrative finding. If, on the other hand, Section 41-2-20 Utah Code Annotated 1953 is construed as requiring a hearing de novo, then this was obviously not done here, as the State did nothing more to sustain its position than to introduce in evidence (the transcript does not even show this was done) three unidentified blue pieces

of paper. Under either alternative, the trial court's procedure was improper.

c. *Even if the means used by the State to prove its case were proper, the evidence is not sufficient to prove habitual negligence.*

To establish even a prima facie case under the statute, the State must have evidence of "three violations" of the Motor Vehicle Code. Mr. Miller relied solely upon the "Report of Conviction for Violation of Motor Vehicle Law." These pieces of paper remained unidentified, out of court declarations by unidentified parties. Other than those pieces of paper there is no evidence of a conviction at all. There is no evidence that a complaint was ever filed in any of these matters, nor is there one bit of testimony that McAnerney was convicted of any of these offenses.

Even the "ticket" or "citation" issued by a traffic officer (such as the one appended to Exhibit 3) is merely a notice to appear. (Sec. 41-6-167 UCA '53). As traffic offenses are a crime (Sec. 41-6-164 UCA '53), the Code of Criminal Procedure applies, and this require the commencement of the action by complaint under oath (Sec. 77-57-2; 77-10-1 UCA '53). Even the statutory provision that forfeiture of bail is equivalent to a conviction (Sec. 41-2-17c UCA '53) certainly means bail posted after a complaint has been filed and an action properly commenced.

This problem is one that this court is of course quite familiar with because of the rule enacted by it on January 7, 1958, to be effective February 1, 1959, providing a procedure whereby notices given by police officers may be treated as complaints.

Moreover, each Utah offense charged against McAnerney was a speeding charge for exceeding posted limits. Under Utah law, speeds in excess of posted limits are only prima facie evidence that such speeds were not reasonable and prudent, and the sole statutory prohibition is that a driver may not drive at a speed greater than is "reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing." Section 41-6-46,, Utah Code Annotated 1953. A review of the transcript of McAnerney's testimony in these cases, which is the only evidence before the court, surely does not justify a finding that his speed was not reasonable and prudent under the conditions.

However, even if it would appear from his testimony that in one or two instances he was not exercising a reasonable and prudent standard, this is far from saying that this is evidence that he is prone to *habitually* so act. To prove habitual conduct, there must be some evidence that the person acts this way more frequently than he does not. For a man who drives up to 1,000 miles a week to be negligent once or twice in eighteen months is no

evidence at all as to what he does as a matter of habit. Concededly, if a man when driving only four times in eighteen months was arrested and convicted of speeding in three such instances, the evidence of habit might be more persuasive, but this merely shows that such a three-time test or standard is too vague and unreliable and has little correlation to the actual facts in each case.

POINT III.

THE STATE ERRED IN USING THE SAME EVIDENCE TWICE.

McAnerney's original suspension (reduced to a restriction) was based upon alleged offenses on March 8, 1956, March 28, 1957 and May 28, 1957. The Department made its determination as to these facts and exacted its penalty. McAnerney then went for almost a year without any violations at all in the State of Utah until a speeding charge on May 19, 1958. Yet the Department then sought to resurrect the two latter of the previous charges and because the last three came within an eighteen month period, McAnerney's license was suspended again, this time for a six-month period.

Under this procedure, the repentent driver has little chance of redemption. Each offense thereafter brings with it a penalty of ever increasing severity. There is absolutely no language in the statute to indicate that these offenses should bring a cumula-

tive penalty. Such procedure certainly smacks of double jeopardy in the civil field. Reference therefore to the offenses used to impose a previous sanction is improper.

POINT IV.

COURTS HAVE NOT HESITATED TO RIGIDLY CONSTRUE STATUTES OF THIS SORT.

Often the courts have proved the last recourse of the citizen from administrative bullying. Whether one classifies the driver's license as a property right or merely as a privilege, it is clear that in the middle of the 20th Century the right to drive an automobile is of extreme value, particularly where the man's livelihood depends upon this, as in the case of Mr. McAnerney here.

The courts have heretofore not hesitated in setting up exacting tests in those cases where this right is sought to be taken from one of its citizens.

Thus our neighbor state of Wyoming quite recently held a statute dealing with revocation of drivers' licenses unconstitutional. *Eastwood* v. *Wyoming Highway Department*, 301 P. 2d 818 (1956). That court quoted with approval a Virginia case where the court stated:

> "The majority of the cases lay down the rule that statutes or ordinances vesting discretion in administrative officers and bureaus must lay down rules and tests to guide and

control them in the exercise of the discretion granted in order to be valid . . ." Citing *Thompson* v. *Smith* (Va.) 154 S. E. 579, 71 A.L.R. 604.

The Supreme Court of Idaho has also held that a driver's license is a property right and that the procedure for revocation thereof followed in that case was unconstitutional. *State* v. *Kouni* (Ida. 1938) 76 P. 2d 917.

CONCLUSION

For these reasons, appellant contends that the administrative procedure used by the State is improper and unconstitutional, and that the State has failed to prove even by a preponderance of the evidence that appellant is an habitually negligent driver.

Respectfully submitted,

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